Supreme Court, U.S.
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No. __-___

In the
Supreme Court of the United States

State of ALABAMA,
Petitioner,

v.

Kenneth Edward MOFFITT,
Respondent.

On Writ of Certiorari to the Supreme Court of Alabama

PETITION OF THE STATE OF ALABAMA FOR WRIT OF CERTIORARI

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53 pp

QUESTION PRESENTED

Did the Alabama Supreme Court err in ruling that a police officer did not have probable cause to pursue a fleeing suspect into an apartment, because the officer lacked direct evidence – in the form of a statement by a bystander – that the suspect had committed a crime?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

PETITION FOR WRIT OF CERTIORARI 1

DECISIONS BELOW 2

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 6

I. The Alabama and Colorado Supreme Courts Have Departed From the Majority Rule That the Police Need Not Have Direct Evidence That a Suspect Committed a Crime In Order to Have Probable Cause to Conduct a Search or Obtain a Warrant 8

II. The Ruling of the Alabama Supreme Court Is So Clearly Erroneous That This Court Might See Fit To Grant the Writ of Certiorari and Summarily Reverse 16

CONCLUSION 16

TABLE OF AUTHORITIES

CASES **Page**

Coleman v. City of New York,
177 F. Supp. 2d 151 (S.D.N.Y. 2001) 15

DeVooght v. State,
722 P.2d 705 (Okla. Crim. App. 1986) 16

Draper v. United States,
358 U.S. 307 (1959) 7

Ex parte Moffitt, No. 1001739, 2002 WL 254129 (Ala. Feb. 22, 2002) 1, 2, 5

Gibson v. State,
758 So. 2d 782 (La. 2000) 15

Illinois v. Gates,
462 U.S. 213 (1983) 6, 7, 11

Ker v. California,
374 U.S. 23 (1963) 7

Locke v. United States,
7 Cranch. 339, 3 L.Ed. 364 (1813) 7

Moffitt v. State,
CR-00-0574 (Ala. Crim. App. May 18, 2001) 2, 4

People v. Boff,
766 P.2d 646 (Colo. 1988) 15

CASES **Page**

People v. King,
16 P.3d 807 (Colo. 2001) 8, 11, 15, 16

Sibron v. New York,
392 U.S. 40 (1968) 10

Spinelli v. United States,
393 U.S. 410 (1969) 7

State v. Cox,
45 N.W.2d 100 (Wis. 1951) 16

State v. Kerr,
511 N.W.2d 586 (Wis. 1994) 15

United States v. Bell,
833 F.2d 272 (11th Cir. 1987) 15

United States v. Cortez,
449 U.S. 411 (1981) 8

United States v. Edmiston,
46 F.3d 786 (8th Cir. 1995) 15

United States v. Snow,
82 F.3d 935 (10th Cir. 1996) 15

STATUTES

28 U.S.C. § 1257(a) 2

Ala. Code § 13A-5-9 (1975) 4

Ala. Code § 13A-12-212 (1975) 4

PETITION FOR WRIT OF CERTIORARI

The State of Alabama petitions this Court for a writ of certiorari to the Alabama Supreme Court to review and reverse the decision in *Ex parte Moffitt*, --- So. 2d ---, No. 1001739, 2002 WL 254129 (Ala. Feb. 22, 2002) (Pet. App. 1a).

In *Moffitt*, the Supreme Court of Alabama reversed the defendant's conviction on the ground that evidence seized during the search of an apartment into which he had fled should have been suppressed. The court ruled that the police lacked probable cause to search the apartment where they found the evidence, even though (1) the police had received a report of shots fired in the area, (2) the police had seen the defendant flee into the apartment as they approached, (3) the police were told by bystanders that the defendant had a gun, and (4) the police did not know who occupied the apartment[1] or whether any other people were currently in it. Without direct evidence – such as a statement by one of the bystanders – that the defendant was the one who had actually fired the earlier shots, the Alabama Supreme Court ruled that the police lacked probable cause to pursue the defendant into the apartment.

This ruling adds to a disturbing trend among state supreme courts of injecting a direct-evidence requirement into the "totality of the circumstances" test that this Court has prescribed for determinations of probable cause. These rulings conflict with the majority rule and unduly handcuff the police in the performance of their duties to apprehend suspects and

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[1] The police later learned that the apartment belonged to Moffitt's girlfriend and that he was staying there at the time.

protect the public. The police must be permitted to use their experience and instincts to draw inferences from the circumstances about whether a person has committed a crime or poses a threat to public safety. They will not be able to do their jobs if they must pause to gather evidence of the nature required by the Alabama Supreme Court, before pursuing those who appear from all the circumstances to have committed or to be in the process of committing a crime.

This Court should grant the writ of certiorari to arrest this trend among the state supreme courts and to reverse the ruling of the Alabama Supreme Court. Indeed, the error of the ruling is so apparent that this Court may see fit summarily to reverse the Alabama Supreme Court.

DECISIONS BELOW

The decision of the Alabama Court of Criminal Appeals was an unpublished memorandum opinion. *Moffitt v. State*, CR-00-0574 (Ala. Crim. App. May 18, 2001) (Pet. App. 9a). The decision of the Alabama Supreme Court will be published and can be found at *Ex parte Moffitt*, No. 1001739, 2002 WL 254129 (Ala. Feb. 22, 2002) (Pet. App. 1a).

STATEMENT OF JURISDICTION

The Alabama Supreme Court issued its opinion reversing Moffitt's conviction on February 22, 2002. The court denied the State's petition for rehearing on May 31, 2002. (Pet. App. 28a). The State invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides in pertinent part:

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .

STATEMENT OF THE CASE

1. On June 10, 2000, Officer Jerry Lynn Watkins of the Dothan, Alabama Police Department received a dispatch stating that shots had been fired at the Johnson Homes apartment complex. (R. 37, 50-51.[2]) As Watkins arrived at the scene, he saw four individuals standing outside the apartments arguing. (R. 37-38, 51.) Watkins approached the four individuals, and one of them began to yell: "Here he is. Here he is. Here he is." (R. 57.) At that moment, Moffitt, the defendant, ran from the group. One of the other bystanders yelled to Watkins: "That's him. He's got a gun." (R. 52, 53, 57.) Watkins and another officer chased Moffitt, who fled into an apartment. (R. 38, 53) Watkins testified that he chased Moffitt into the apartment because he through Moffitt "would probably be pretty dangerous if he was out there shooting." (R. 38.)

The officers entered the apartment and began searching for Moffitt. (R. 38, 39, 54.) While searching for Moffitt, the officers saw in plain view several pieces of crack cocaine in the master bedroom lying on top of

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[2] "R. __" refers to a page in the record from the trial of this case.

the TV, on both sides of the TV, and on the TV stand. (R. 40, 54.) The officers then went into the bedroom across the hall, where a small child was sitting on the bed, pointing beneath the bed to the officers. (R. 40, 56.) The officers found Moffitt hiding under the bed and arrested him. (R. 56, 70-71.)

2. In August 2000, a Houston County grand jury indicted Moffitt and charged him with unlawful possession of a controlled substance, in violation of Section 13A-12-212 of the Code of Alabama (1975). (C. 6[3].) On October 10, 2000, Moffitt filed a waiver of arraignment and pleaded not guilty to the charge in the indictment. (C. 16.) On December 12, 2000, following a jury trial, Moffitt was found guilty of the charge in the indictment. (C. 3-4, 30-31; R. 119.) The trial court sentenced Moffitt to 25 years' imprisonment under Alabama's Habitual Felony Offender Act, Ala. Code § 13A-5-9, because Moffitt had at least three prior felony convictions. (C. 3-4, 24, 30-31; R. 120-21.) The trial court also ordered Moffitt to pay a $250 fine, a $500 Victim Compensation assessment, a $2000 Drug Demand Reduction Act assessment, and court costs. (C. 4, 31; R. 121.) On December 13, 2000, Moffitt filed a notice of appeal. (R. 35.)

On May 18, 2001, the Court of Criminal Appeals of Alabama, in an unpublished memorandum, affirmed Moffitt's conviction. *Moffitt v. State*, No. CR-00-0574 (Ala. Crim. App. May 18, 2001) (Pet. App. 9a). On June 1, 2001, Moffitt filed an application for rehearing, which the Court of Criminal Appeals overruled on June 15, 2001.

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[3] "C. __" refers to a page in the clerk's record on appeal.

3. On June 27, 2001, Moffitt filed a petition for a writ of certiorari in the Alabama Supreme Court, which the court granted on October 2, 2001. In a 6-3 decision, the Alabama Supreme Court reversed Moffitt's conviction. *Ex parte Moffitt*, No. 1001739, 2002 WL 254129 (Ala. Feb. 22, 2002) (Pet. App. 1a). The court held that the officers lacked probable cause to follow Moffitt into the apartment, and that the trial court therefore should have suppressed the evidence of the drugs found in plain view during the search of the apartment.

The Alabama Supreme Court explained that Officer Watkins lacked probable cause because he had "no evidence to indicate the identity of the reported shooter." *Id.* at *2 (Pet. App. 4a). More specifically, he had "no evidence indicating that anyone told Watkins that Moffitt had *fired* a gun." *Id.* (Pet. App. 4a). The court rejected the State's argument that Officer Watkins could have inferred from the totality of the circumstances -- the "shots fired" dispatch, Moffitt's flight, the information that Moffitt had a gun – that Moffitt had committed attempted murder. "[T]his argument fails to acknowledge the fact that no one informed Watkins that Moffitt had fired a gun at another person or, for that matter, that he had fired a gun under any circumstance." *Id.* at *2 (Pet. App. 5a). "While there was a basis for a reasonable suspicion that Moffitt was in possession of a gun, the mere possession of a gun is not a crime, and there is not evidence that Watkins was aware of any fact indicating that it was unlawful for Moffitt, in particular, to possess a gun." *Id.* (Pet. App. 5a). "Moffitt had not been accused by anyone of committing any crime before Watkins made the warrantless entry into the apartment." *Id.* (Pet. App. 5a).

In dissent, Justice Stuart criticized the majority for distorting the concept of probable cause. "Viewing the evidence at the time of the incident in question rather than with the benefit of hindsight," she said, Officer Watkins "did not know when he pursued Moffitt whether he was faced with a menacing or a reckless endangerment (both misdemeanors) or with an attempted murder (a felony). *Id.* at *4 (Pet. App. 8a). "Moffitt's flight from the scene when the police officer arrived was evidence indicating that he had committed some offense." *Id.* (Pet. App. 8a). Watkins had been told that Moffitt had a gun, so Watkins had reason to believe Moffitt was dangerous when he followed Moffitt into the apartment. *Id.* (Pet. App. 8a). "Before he entered, Officer Watkins could not know who might be inside and what Moffitt might do to anyone who was inside." *Id.* (Pet. App. 8a). "Once he was inside and saw contraband in 'plain view,'" Justice Stuart concluded, "his seizure of it was lawful." *Id.* (Pet. App. 8a).

The State filed an application for rehearing, which the Alabama Supreme Court overruled on May 31, 2002 (Pet. App. 28a).

REASONS FOR GRANTING THE PETITION

As early as 1813, this Court made clear that "the term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation....It imports a seizure made under circumstances which warrant suspicion." *Illinois v. Gates*, 462 U.S. 213, 235 (1983), *quoting Locke v. United States*, 7 Cranch. 339, 348, 3 L.Ed. 364 (1813). "[O]nly the probability, and not a prima facie showing, of criminal activity is the standard of probable cause." *Gates*, 462 U.S. at 235, *quoting*

Spinelli v. United States, 393 U.S. 410, 419 (1969). Furthermore, in making a determination of probable cause,[4] "the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of non-criminal acts." *Gates*, 462 U.S. at 245 n. 13. In fact, "innocent behavior frequently will provide the basis for a showing of probable cause; to require otherwise would be to *sub silentio* impose a drastically more rigorous definition of probable cause than the security of our citizens demands." *Id.*

This Court has therefore held that probable cause analysis requires examination of *all* the facts known to law enforcement officers – the "totality of the circumstances." *Gates*, 462 U.S. at 230-231. The significance of a particular fact must be determined in the context of other facts known to the officer and cannot be established for all cases on a categorical basis. That rule is consistent not only with the reasonableness standard of the Fourth Amendment but also with the practical realities and considerations of law enforcement. Probable-cause analysis requires consideration of "the whole picture" seen by the officer. *Ker v. California*, 374 U.S. 23, 33 (1963) (because "standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application," "[e]ach case is to be decided on its own facts and circumstances"); *cf. United States v. Cortez*, 449 U.S. 411, 417 (1981) ("the essence" of the reasonable suspicion test "is that the totality of the

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[4] The determination of probable cause for the issuance of a warrant for the search of a vehicle or a house is the same for both warrant and warrantless searches. *Draper v. United States*, 358 U.S. 307 (1959).

circumstances – the whole picture – must be taken into account").

The Alabama Supreme Court's ruling in this case violates these principles by injecting a rigid requirement of direct evidence into the standard for probable cause. In a 2001 case, the Colorado Supreme Court practically did the same, invalidating the arrest of two individuals, despite an abundance of circumstantial evidence that they were growing marijuana, because the police "did not see the defendants cultivating marijuana." *People v. King*, 16 P.3d 807, 815 (Colo. 2001). These rulings conflict with those of most state and federal courts that have had no difficulty embracing this Court's directive to consider the totality of the circumstances and not let the presence or absence of direct evidence determine the entire probable cause question. The correctness of the majority rule is so obvious that this Court may see fit to grant certiorari in this case and summarily reverse. If not, the fact that two state supreme courts have committed the same error provides warrant for this Court to grant the State's petition for a writ of certiorari and calendar this case for consideration in the ordinary course.

I. The Alabama and Colorado Supreme Courts Have Departed From the Majority Rule That the Police Need Not Have Direct Evidence That a Suspect Committed a Crime In Order to Have Probable Cause to Conduct a Search or Obtain a Warrant.

Both the Alabama and Colorado Supreme Courts have recently invalidated searches and seizures because the police did not have direct evidence that the suspect had committed a crime. In so doing, these courts have effectively raised the level of proof required

for probable cause from the "mere probability of criminal activity" to something approaching "beyond a reasonable doubt."

1. The Alabama Supreme Court in this case held that Officer Watkins lacked probable cause to enter the apartment into which Moffitt had fled. The court based this holding on the fact that no one told Watkins "that Moffitt had *fired* a gun," as opposed to merely possessing one. *Moffitt*, 2002 WL 254129 at *2 (Pet. App. 4a). "Moffitt had not been accused by anyone of committing any crime before Watkins made the warrantless entry into the apartment." *Id.* (Pet. App. 5a). In other words, Watkins did not have direct evidence, in the form of eyewitness testimony, that Moffitt had committed a crime. The court gave no indication that it considered the totality of the other circumstances and whether those circumstances in combination gave rise to probable cause that Moffitt had committed or was about to commit a gun-related crime.

The totality of the circumstances was as follows: Officer Watkins was responding to a dispatch at approximately 3 o'clock in the morning that shots had been fired at an apartment complex. When Watkins arrived at the scene, he saw four individuals standing in a group outside one of the apartments arguing, and one of the individuals in the group yelled to Watkins, "Here he is. Here he is. Here he is." At that very moment, Moffitt ran from the group, and another individual yelled to Watkins: "There he goes. He's got a gun."

When asked why he then followed Moffitt into the apartment, Officer Watkins explained that the bystanders "had told me that [Moffitt] had a gun" and "we had went there on a shots fired call." (R. 38.) "So,

I figured, you know, [Moffitt] would probably be pretty dangerous if he was out there shooting." (R. 38.) This was a reasonable circumstantial inference. As this Court stated in *Sibron v. New York*, 392 U.S. 40 (1968),

> deliberately furtive actions and flight at the approach of ... law officers are strong indicia of mens rea, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest.

Id. at 66-67 (citations omitted).

In ruling to the contrary, the Alabama Supreme Court has effectively held that a police officer chasing a fleeing suspect must pause to interview bystanders and obtain confirmation in the form of direct testimony that the fleeing suspect actually committed a crime. This Court has condemned so categorical an approach because it "encourag[es] an excessively technical dissection of informant's tips, with undue attention being focused on isolated issues that cannot sensibly be divorced from the other facts presented to the magistrate." *Gates*, 462 U.S. at 234-35. The Alabama Supreme Court ignored this Court's admonition and swept aside the totality of the circumstantial evidence known to Officer Watkins – facts that would have led any reasonable observer to believe it probable that Moffitt had committed a crime and was about to commit another. Not surprisingly, this myopic reasoning led to a nonsensical result.

2. The Alabama Supreme Court is not the only state supreme court guilty of rigidifying the standard of probable cause and injecting a direct-evidence requirement that conflicts with the majority rule. In

People v. King, 16 P.3d 807 (Colo. 2001), the Colorado Supreme Court ruled that the police did not have probable cause to arrest two men suspected of marijuana cultivation, based on the following facts:

> In September 1999, a U.S. Forest Service Investigator learned from hunters that a marijuana "garden" was growing in Roche Gulch, Dolores County, Colorado. Roche Gulch is a dead end or "box" canyon. A road leads into the canyon and ends in an area where hunters or hikers can park. A trail leaves from this area. The marijuana garden was clustered around a natural spring hidden above the trail and was divided into eleven plots, containing more than 200 plants. The forest investigator relayed the hunters' information to agents of the Twenty-Second Judicial District Drug Task Force, who went to the site the next day. Agent Buffington took samples of the leaves from some of the plants and these samples tested positive as marijuana. Buffington testified that the agents noticed that there was fishing line around several of the plots on which hung "a green cloth that looked like it had been sprayed with some type of chemical." In the vicinity, agents also found two empty bottles of what Agent Buffington believed was "Grant's deer repel."
>
> While placing a surveillance camera at the garden to monitor activity there, agents found a Continental Airlines luggage tag lying under some bushes between two of the marijuana plots. The luggage tag bore the name "Tim Gulick" and listed a Durango address. This address was not valid, but a Timothy Gulick

was listed as living at an address in Montezuma County, Colorado. That Friday, agents went to that address, where they observed a blue Nissan pickup registered to defendant Kam King. Agent Bennett spoke to a person at that address who identified himself as Kam King. In his testimony, Agent Bennett described Mr. King as approximately six-feet tall with dishwater blond hair. None of the agents saw Mr. Gulick, but records showed him as also around six- feet tall but with longer hair, below his shoulders.

The next Monday, officers returned to Roche Gulch to retrieve the surveillance tape and to put new tape in the camera. They viewed the tape they retrieved that day. This tape showed nighttime footage of two men shining flashlights on the marijuana in the garden. Agent Buffington testified that the only distinguishing feature in the tape was that one of the men had long light hair and that he could not determine whether either of the individuals shining flashlights in the garden was King or Gulick.

That night, the agents set up live surveillance at Roche Gulch. Agent Bennett donned night-vision equipment and climbed up a hillside to observe the garden and the road leading into and out of the canyon. He was in radio communication with Agent Buffington, who parked down the road from the Gulch. Dolores County Undersheriff Shane Schmalz was also present. The trial court found that all the officers had agreed they would arrest anyone removing marijuana. After reaching his hillside perch, Agent Bennett viewed a blue Nissan pickup on the road and identified it as

the one he observed at the Gulick residence belonging to defendant King. He communicated this information to Agent Buffington.

Approximately one hour later, Agent Bennett watched as two men with flashlights, one carrying a backpack that appeared to be full, the other with long hair and a dog, walked out of the canyon. The trial court found that Agent Buffington suspected that the backpack contained marijuana. Agent Bennett testified that, although one of the men appeared to have long hair, Bennett was not able to determine any facial features or other identifying attributes of either man through his night vision goggles. Agent Bennett was also unable to determine whether the men were carrying weapons. After the two men entered the Nissan pickup, Agent Bennett watched them drive out of the canyon. Bennett relayed this information to his fellow officers and ran down the hill to his car.

King, 16 P.3d at 810-11 (footnotes omitted.) The officers then arrested the men and during searches incident to arrest found further evidence of marijuana Both defendants were charged with, inter alia, cultivation of marijuana. *Id.* at 812. The trial court granted both of the defendants' motions to suppress the fruit of the search on the basis that it was procured incident to an illegal arrest. The State filed an interlocutory appeal in each case, *id.*, but the Colorado Supreme Court affirmed.

Like the Alabama Supreme Court in this case, the Colorado Supreme Court reasoned that "probable cause existed to believe that the crime of cultivation of marijuana had been committed," but that no probable

cause existed "to believe that the defendants were the people cultivating the marijuana." *Id.* at 814-15. Like the Alabama Supreme Court in this case, the Colorado Supreme Court downplayed all the circumstantial evidence that was known to the police. Unlike the Alabama Supreme Court, the Colorado Supreme Court did note the absence of certain other circumstantial evidence (footprints in the marijuana garden, possession of cultivation tools by the defendants) that the court hinted might have given the police probable cause, *id.*, but the court made clear the priority it placed on the lack of direct evidence by its emphasis on this single fact: "The police did not see the defendants cultivating marijuana." *Id.* at 815. In fact, the Colorado Supreme Court distinguished another case in which it had upheld the arrest of a defendant for cultivation of marijuana on the ground that a police surveillance team in the other case had actually seen the defendant watering the marijuana plants. *King*, 16 P.3d at 815-16 (citing and distinguishing *People v. Boff*, 766 P.2d 646 (Colo. 1988)).

In short, like the Alabama Supreme Court in this case, the Colorado Supreme Court allowed the lack of direct evidence to override the combination of the circumstantial evidence gathered by the police prior to arresting the defendants. In so doing, it elevated the standard of proof for probable cause to a level resembling that required at trial.

3. Other state and federal courts have not struggled to recognize that circumstantial evidence alone may give rise to probable cause. *United States v. Edmiston*, 46 F.3d 786, 789 (8th Cir. 1995) ("If circumstantial evidence can be sufficient to prove the elements of crime beyond a reasonable doubt, then *a fortiori* such evidence can be sufficient to establish

probable cause for the issuance of a search warrant"); *United States v. Bell*, 833 F.2d 272, 277 (11th Cir. 1987) (finding probable cause to arrest three defendants for possession of marijuana despite lack of direct evidence that defendants actually possessed the marijuana seized by the police); *United States v. Snow*, 82 F.3d 935 (10th Cir. 1996) (no clear error in district court's finding of probable cause despite lack of direct evidence); *Coleman v. City of New York*, 177 F. Supp. 2d 151, 156 (S.D.N.Y. 2001) ("circumstantial evidence and inferences therefrom can suffice to support a finding of probable cause"); *Gibson v. State*, 758 So. 2d 782, 790 (La. 2000) (defendant can be convicted on circumstantial evidence alone and probable cause does not require direct, physical evidence); *State v. Kerr*, 511 N.W.2d 586, 589 (Wis. 1994) ("Although there was no direct evidence of [the defendant's] drug possession and no single circumstance that alone would justify the warrant, there was extensive circumstantial evidence that, taken together, justified the finding of probable cause"); *State v. Cox*, 45 N.W.2d 100, 103 (Wis. 1951) ("circumstantial evidence may constitute probable cause"); *DeVooght v. State*, 722 P.2d 705, 709 (Okla. Crim. App. 1986) (direct evidence "certainly is not required to prove probable cause"). Most jurisdictions likely consider the proposition obvious enough that they do not need explicitly to state it. The recent rulings of the Alabama and Colorado Supreme Courts conflict with this authority, on a constitutional issue of significant public interest. The conflict warrants this Court's attention.

II. The Ruling of the Alabama Supreme Court Is So Clearly Erroneous That This Court Might See Fit To Grant the Writ of Certiorari and Summarily Reverse.

This Court may view the majority rule as so obvious and this Court's own Fourth Amendment precedents as so clear that it is inclined to dismiss the rulings of the Alabama and Colorado Supreme Courts as aberrant and to a certain extent confined by the facts in each case. If so, this Court would be justified in granting certiorari and summarily reversing the ruling of the Alabama Supreme Court. If not, this Court would still be justified in granting certiorari and calendaring this case for consideration in the ordinary course.

The rationale of the Alabama Supreme Court in this case, if read seriously and taken to its logical conclusion, will paralyze the police in the performance of their public duties. The police on the street are typically called upon to act quickly and decisively in response to uncertain and unfolding factual scenarios. They will not be able pursue suspects as readily and respond to emergency dispatches as forthrightly if they are not allowed to connect the dots as Officer Watkins did in this case. The ruling of the Alabama Supreme Court in this case – and of the Colorado Supreme Court in *King* – imposes an unrealistic, trial-like burden of proof upon the police, who must do their jobs in real-world, non-courtroom situations that do not admit to lawyer-like reflection and recrimination.

CONCLUSION

This Court should grant the State's petition for a writ of certiorari. The error of the ruling below is so

apparent that this Court may see fit summarily to reverse the Alabama Supreme Court.

Respectfully submitted,

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August 29, 2002

APPENDIX

SUPREME COURT of ALABAMA

Ex parte Kenneth Edward MOFFITT

Kenneth Edward Moffitt
v.
State of Alabama

1001739

Feb. 22, 2002

WOODALL, Justice.

Kenneth Edward Moffitt was convicted of unlawful possession of a controlled substance (cocaine), a violation of § 13A-12-212(a), Ala. Code 1975. On appeal to the Court of Criminal Appeals, Moffitt presented the following arguments: that the trial court had erred in denying his motion to suppress the cocaine, because, he argued, the cocaine was seized during an illegal warrantless search; that the trial court had erred in denying his motion for a judgment of acquittal, because, he said, the State had failed to establish that he constructively possessed the cocaine; that the trial court had erred in denying his motion for a mistrial after the prosecutor had made statements indicating to the jury that Moffitt was in jail while he was awaiting trial; and that the trial court had erred in denying his *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986), motion. The Court of Criminal Appeals affirmed the judgment of the trial court in an unpublished memorandum. *Moffitt v. State* (No. CR-00-0574, May 18, 2001), --- So.2d ---- (Ala.

Crim. App. 2001) (table). Moffitt petitioned this Court for certiorari review as to all claims except the Batson claim. We granted Moffitt's petition. We reverse and remand.

Moffitt first argues that the trial court erred in denying his motion to suppress evidence (cocaine), which, he argues, was seized pursuant to an illegal warrantless entry into a private residence. The facts surrounding the officer's warrantless entry into an apartment were stated in the Court of Criminal Appeals' unpublished memorandum:

> Jerry Lynn Watkins, an officer with the Dothan Police Department, testified that, on June 10, 2000, at approximately 3:23 a.m., he responded to a dispatch that shots had been fired at the Johnson Homes apartment complex. As he arrived, he saw four people who appeared to be arguing standing outside behind the apartments. The people yelled for him to stop, and when he did, [Moffitt] started running. A male who was standing with the group said that [Moffitt] had a gun. Watkins explained that he followed [Moffitt] because he 'figured ... he would probably be pretty dangerous if he was out there shooting.' (R. 38.) [Moffitt] ran into the back door of an apartment, and Watkins followed shortly thereafter. He searched the kitchen, the living room, and the master bedroom, but [Moffitt] was not in any of those rooms. However, while he was looking for [Moffitt] in the master bedroom, he saw in plain view what appeared to be cocaine on top of and on both sides of a television. Finally, he went

> into the bedroom across the hall from the master bedroom, where he saw a small child who was sitting on a bed pointing under the bed. Watkins took the child off of the bed, lifted the bed, and found [Moffitt] on the floor under the bed.

Our conclusion regarding this first argument is dispositive of this case.

"[A] principal protection against unnecessary intrusions into private dwellings is the warrant requirement imposed by the Fourth Amendment [to the United States Constitution] on agents of the government who seek to enter the home for purposes of search or arrest." *Welsh v. Wisconsin*, 466 U.S. 740, 748, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984). It is well established that warrantless entries to residences are presumptively unreasonable.

> It is well settled that warrantless entries to and searches of a residence are presumptively unreasonable and that the burden is on the government to demonstrate exigent circumstances justifying a warrantless entry and search. *Welsh v. Wisconsin*, 466 U.S. 740, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984); *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980); *Landreth v. State*, 600 So. 2d 440 (Ala. Crim. App. 1992). To justify a warrantless entry and search, the state needs to show both the existence of probable cause and exigent circumstances. *United States v. Rodgers*, 924 F.2d 219 (11th Cir. 1991), *cert. denied*, 501 U.S. 1221, 111 S. Ct. 2834, 115 L.

Ed. 2d 1003 (1991), *appeal after remand*, 981 F.2d 497 (11th Cir. 1993); *Etheridge v. State*, 414 So. 2d 157 (Ala. Crim. App. 1982).

A.A.G. v. State, 668 So.2d 122, 126 (Ala. Crim. App. 1995). "The establishment of probable cause requires only that facts available to the officer at the moment of [entry] would warrant a person of reasonable caution to believe that the action taken by the officer was appropriate." *Id.* at 127.

The Court of Criminal Appeals held that probable cause existed to justify the officer's warrantless entry into the apartment to search for Moffitt. After reviewing the undisputed facts, we conclude that the State did not carry its burden to show the existence of probable cause. Therefore, the trial court erred in denying Moffitt's motion to suppress the cocaine evidence discovered following the unlawful warrantless entry.

Officer Watkins was sent to the Johnson Homes apartment complex, where gunshots were reported to have been fired. There is no evidence to indicate that he was given any information concerning the identity of the reported shooter. When he arrived at the apartment complex, Watkins saw four people, who appeared to be arguing, standing behind the apartments. The people yelled for Watkins to stop. When Watkins stopped, Moffitt, who was standing in the group, began to run. As Moffitt ran from the group, a male in the group told Watkins that Moffitt had a gun. There is no evidence indicating that anyone told Watkins that Moffitt had fired a gun. Watkins then ran after Moffitt, following him into an apartment. When asked why he entered the apartment, Watkins

stated "[he] figured ... [Moffitt] would probably be pretty dangerous if he was out there shooting." (R. 38.) While searching the apartment for Moffitt, Watkins saw in plain view the cocaine that Moffitt sought to suppress.

When Watkins entered the apartment, the facts available to him were not sufficient to support a reasonable belief that Moffitt had committed any crime. The State argues that Watkins "could have reasonably believed ... that Moffitt had committed the crime of attempted murder." (State's Brief, at 10.) However, this argument fails to acknowledge the fact that no one informed Watkins that Moffitt had fired a gun at another person or, for that matter, that he had fired a gun under any circumstance. While there was a basis for a reasonable suspicion that Moffitt was in possession of a gun, the mere possession of a gun is not a crime, and there is no evidence that Watkins was aware of any fact indicating that it was unlawful for Moffitt, in particular, to possess a gun. While the State argues that "[a]t the very least, the [officer was] aware that the alleged crime Moffitt had committed involved a gun" (State's Brief, at 10), it is undisputed that Moffitt had not been accused by anyone of committing any crime before Watkins made the warrantless entry into the apartment.

The trial court erred in denying Moffitt's motion to suppress the cocaine evidence. Therefore, the Court of Criminal Appeals erred in affirming its judgment. The judgment of the Court of Criminal Appeals is reversed, and this case is remanded for an order or proceedings consistent with this opinion.

REVERSED AND REMANDED.

HOUSTON, SEE, LYONS, JOHNSTONE, and HARWOOD, JJ., concur.

MOORE, C.J., and BROWN and STUART, JJ., dissent.

STUART, Justice (dissenting).

I respectfully dissent. I believe the Court of Criminal Appeals correctly decided this case. In its unpublished memorandum in this case, that court stated:

> The appellant argues that the search was not legal because the officers did not have a warrant to search the apartment and because the exceptions to the warrant requirement allegedly did not apply in this case.
>
> > It is well settled that warrantless entries to and searches of a residence are presumptively unreasonable and that the burden is on the government to demonstrate exigent circumstances justifying a warrantless entry and search. *Welsh v. Wisconsin*, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984); *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); *Landreth v. State*, 600 So.2d 440 (Ala.Cr.App.1992). To justify a warrantless entry and search, the state needs to show both the existence of probable cause and exigent circumstances. *United States v. Rodgers*, 924 F.2d 219 (11th Cir.1991), cert. denied, 501 U.S. 1221, 111 S.Ct. 2834, 115 L.Ed.2d 1003 (1991), *appeal after remand*,

981 F.2d 497 (11th Cir.1993); *Etheridge v. State*, 414 So.2d 157 (Ala.Cr.App.1982).

....

The establishment of probable cause requires only that facts available to the officer at the moment of search would warrant a person of reasonable caution to believe that the action taken by the officer was appropriate.

A.A.G. v. State, 668 So. 2d 122, 126-27 (Ala. Crim. App. 1995).

> "[T]he ultimate test for determining whether exigent circumstances exist justifying a warrantless entry 'is whether there is such a compelling necessity for immediate action as will not brook the delay of obtaining a warrant.'" *United States v. Cresta*, 592 F. Supp. 889, 901 (D. Maine 1984).... "The exigent circumstances doctrine recognizes several common situations where the time consuming resort to a neutral magistrate for an arrest or search warrant is unnecessary, for example: hot pursuit, ... fleeing suspect, ... danger to arresting officer or the public from the suspect...." *United States v. Kreimes*, 649 F.2d 1185, 1192 (5th Cir. 1981) (citations omitted).

Musgrove [v. State], 519 So. 2d [565,] 572 [(Ala. Crim. App.), aff'd, 519 So.2d 586 (Ala. 1986), cert. denied, 486 U.S. 1036, 108 S. Ct.

> 2024, 100 L. Ed. 2d 611 (1988)]. *See also Bush v. State*, 523 So. 2d 538 (Ala. Crim. App. 1988).
>
> *C.M.B. v. State*, 594 So. 2d 695, 699 (Ala. Crim. App. 1991) (emphasis added [in Court of Criminal Appeals' unpublished memorandum]). Furthermore, an officer's belief that a suspect is carrying a weapon is a factor that may be considered in determining whether exigent circumstances exist for the purpose of making a warrantless entry. *Id.*
>
> In this case, Watkins had responded to a report that shots had been fired. When he arrived, [Moffitt] fled, and another person stated that [Moffitt] was armed with a gun. [Moffitt] entered an apartment, and Watkins, who was in hot pursuit of [Moffitt], subsequently entered the apartment. Therefore, both probable cause and exigent circumstances existed to justify Watkins's warrantless entry into the apartment to search for [Moffitt].

Viewing the evidence at the time of the incident in question rather than with the benefit of hindsight, I conclude that the police officer did not know when he pursued Moffitt whether he was faced with a menacing or a reckless endangerment (both misdemeanors) or with an attempted murder (a felony). Moffitt's flight from the scene when the police officer arrived was evidence indicating that he had committed some offense. Officer Watkins was informed that Moffitt had a gun, so he had reason to believe he was dangerous. As he was being chased by Watkins, Moffitt entered an apartment. Before he entered, Officer Watkins could

not know who might be inside and what Moffitt might do to anyone who was inside. Officer Watkins's warrantless entry into the apartment was justifiable and lawful. Once he was inside and saw contraband in "plain view," his seizure of it was lawful. I would quash the writ of certiorari. Therefore, I must dissent.

COURT of CRIMINAL APPEALS of ALABAMA

Kenneth Edward MOFFITT

v.

STATE

CR-00-0574

May 18, 2001

MEMORANDUM

BASCHAB, JUDGE.

The appellant was convicted of unlawful possession of a controlled substance (cocaine), a violation of § 13A-12-212(a)(1), Ala. Code 1975. The trial court sentenced him, as a habitual offender, to serve a term of twenty-five years in prison. See § 13A-5-9(c)(1), Ala. Code 1975. It also imposed a $2,000 Demand Reduction Assessment Act fine. See § 13A-12-281, Ala. Code 1975. This appeal followed.

I.

The appellant argues that the trial court erroneously denied his motion to suppress cocaine law enforcement officers seized during an allegedly illegal search. (Issue I in the appellant's brief.) During the suppression hearing, Jerry Lynn Watkins, an officer with the Dothan Police Department, testified that, on June 10, 2000, at approximately 3:23 a.m., he responded to a dispatch that shots had been fired at

the Johnson Homes apartment complex. As he arrived, he saw four people who appeared to be arguing standing outside behind the apartments. The people yelled for him to stop, and when he did, the appellant started running. A male who was standing with the group said that the appellant had a gun. Watkins explained that he followed the appellant because he "figured... he would probably be pretty dangerous if he was out there shooting." (R. 38.) The appellant ran into the back door of an apartment, and Watkins followed shortly thereafter. He searched the kitchen, the living room, and the master bedroom, but the appellant was not in any of those rooms. However, while he was looking for the appellant in the master bedroom, he saw in plain view what appeared to be cocaine on top of and on both sides of a television. Finally, he went into the bedroom across the hall from the master bedroom, where he saw a small child who was sitting on a bed pointing under the bed. Watkins took the child off of the bed, lifted the bed, and found the appellant on the floor under the bed.

The appellant argues that the search was not legal because the officers did not have a warrant to search the apartment and because the exceptions to the warrant requirement allegedly did not apply in this case.

> It is well settled that warrantless entries to and searches of a residence are presumptively unreasonable and that the burden is on the government to demonstrate exigent circumstances justifying a warrantless entry and search. *Welsh v. Wisconsin*, 466 U.S. 740, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984); *Payton*

> *v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980); *Landreth v. State*, 600 So. 2d 440 (Ala. Cr. App. 1992). To justify a warrantless entry and search, the state needs to show both the existence of probable cause and exigent circumstances. *United States v. Rodgers*, 924 F.2d 219 (11th Cir. 1991), cert. denied, 501 U.S. 1221, 111 S. Ct. 2834, 115 L. Ed. 2d 1003 (1991), *appeal after remand*, 981 F.2d 497 (11th Cir. 1993); *Etheridge v. State*, 414 So. 2d 157 (Ala. Cr. App. 1982).
>
> ...
>
> The establishment of probable cause requires only that facts available to the officer at the moment of search would warrant a person of reasonable caution to believe that the action taken by the officer was appropriate.

A. A. G. v. State, 668 So. 2d 122, 126-27 (Ala. Crim. App. 1995).

> "[T]he ultimate test for determining whether exigent circumstances exist justifying a warrantless entry 'is whether there is such a compelling necessity for immediate action as will not brook the delay of obtaining a warrant.'" *United States v. Cresta*, 592 F. Supp. 889, 901 (D. Maine 1984).... "The exigent circumstances doctrine recognizes several common situations where the time consuming resort to a neutral magistrate for an arrest or search warrant is unnecessary, for example: hot pursuit, ... fleeing suspect, ... danger to arresting officer or the public

> from the suspect...." *United States v. Kreimes*, 649 F.2d 1185, 1192 (5th Cir. 1981) (citations omitted).
>
> *Musgrove [v. State]*, 519 So. 2d [565,] 572 [(Ala. Crim. App.), *aff'd*, 519 So. 2d 586 (Ala. 1986), *cert. denied*, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 11(1988)]. *See also Bush v. State*, 523 So. 2d 538 (Ala. Crim. App. 1988).

C. M. B. v. State, 594 So. 2d 695, 699 (Ala. Crim. App. 1991) (emphasis added). Furthermore, an officer's belief that a suspect is carrying a weapon is a factor that may be considered in determining whether exigent circumstances exist for the purpose of making a warrantless entry. *Id.*

In this case, Watkins had responded to a report that shots had been fired. When he arrived, the appellant fled, and another person stated that the appellant was armed with a gun. The appellant entered an apartment, and Watkins, who was in hot pursuit of the appellant, subsequently entered the apartment. Therefore, both probable cause and exigent circumstances existed to justify Watkins' warrantless entry into the apartment to search for the appellant.

> As the officers' entry and search for the suspect was lawful, the incidental discovery of the contraband during the course of the search was likewise lawful under the "plain view" doctrine. *Coolidge v. New Hampshire* (1971), 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564. It is well settled that an object in plain view of an officer who lawfully is in a position to have that view is subject to seizure. *Harris v. United States*

(1968), 390 U.S. 234, 88 S. Ct. 992, 19 L. Ed. 2d 1067. Montana has applied this principle and stated the rule in this language:

> The rule is: Where there is prior justification for the police to search an area, and in searching the area, they inadvertently find incriminating evidence which they had no reason to anticipate, they may lawfully seize that incriminating evidence.

State v. Gallagher (1973), 162 Mont. 155, 167, 509 P. 2d 852, 858.

Terry v. State, 469 So. 2d 1359, 1360 (Ala. Crim. App. 1985), *cert. denied*, 474 U.S. 826, 106 S. Ct. 84, 88 L. Ed. 2d 69 (1985) (quoting *State ex rel. Zander v. District Court of Fourth Judicial Dist., In and For Missoula County*, 180 Mont. 548, 591 P.2d 656, 659 (1979)).

> Under the plain view exception to the warrant requirement, an officer may seize evidence of a crime if he is legitimately on the premises where he views the evidence and if the incriminating nature of the evidence is "immediately apparent." *Williams v. State*, 527 So. 2d 764 (Ala. Crim. App. 1987). Where officers are lawfully on the scene investigating a crime and evidence is observed in plain view, that evidence may be lawfully seized, despite the absence of a search warrant. *Duck v. State*, 518 So. 2d 857 (Ala. Crim. App. 1987); *Smith*, supra; *Pearson v. State*, 356 So. 2d 776 (Ala. Crim. App. 1978).

Landreth v. State, 600 So. 2d 440, 445 (Ala. Crim. App. 1992) (footnote omitted). Because Watkins properly entered the apartment to search for the appellant, his discovery of the cocaine during the course of his search for the appellant was lawful under the plain view doctrine. Therefore, the trial court properly denied the appellant's motion to suppress the cocaine.

II.

The appellant also argues that the trial court erroneously denied his motion for a judgment of acquittal because the State allegedly did not establish that he constructively possessed the cocaine. (Issue III in the appellant's brief.) Although he challenged the sufficiency of the evidence at the close of the State's case, he did not renew his challenge at the close of his case or in a motion for a new trial. Therefore, we will consider only the State's evidence in reviewing this contention. *See Burell v. State*, 680 So. 2d 975 (Ala. Crim. App. 1996).

> In reviewing the denial of a motion for judgment of acquittal, this court must determine whether any evidence tending to point to the accused's guilt was before the trial court when that motion was made. *LaBarber v. State*, 455 So. 2d 941 (Ala. Crim. App. 1984). In addition, the State's evidence must be received as true and must be viewed in a light that is most favorable to the State. *McConnell v. State*, 429 So. 2d 662 (Ala. Crim. App. 1983). Finally, the State must be accorded all legitimate inferences arising from the evidence presented. *White v. State*, 546 So. 2d 1014 (Ala. Crim. App. 1989).

Smith v. State, 601 So. 2d 201, 203 (Ala. Crim. App. 1992). Also,

> [c]ircumstantial evidence is not inferior evidence, and it will be given the same weight as direct evidence, if it, along with the other evidence, is susceptible of a reasonable inference pointing unequivocally to the defendant's guilt. *Ward v. State*, 557 So. 2d 848 (Ala. Cr. App. 1990). In reviewing a conviction based in whole or in part on circumstantial evidence, the test to be applied is whether the jury might reasonably find that the evidence excluded every reasonable hypothesis except that of guilt; not whether such evidence excludes every reasonable hypothesis but guilt, but whether a jury might reasonably so conclude. *Cumbo v. State*, 368 So. 2d 871 (Ala. Crim. App. 1978), *cert. denied*, 368 So. 2d 877 (Ala. 1979).

Ward, 610 So. 2d at 1191-92.

Lockhart v. State, 715 So. 2d 895, 899 (Ala. Crim. App. 1997).

> A person commits the crime of unlawful possession of controlled substance if:
>
> (1) Except as otherwise authorized, he possesses a controlled substance enumerated in Schedules I through V.

§ 13A-12-2 12(a)(1), Ala. Code 1975.

> In order to sustain a conviction for possession of controlled substances, there must be sufficient evidence of either actual or constructive possession. *Radke v. State*, 52 Ala. App. 397, 293 So. 2d 312 (1973), *aff'd*, 292 Ala. 290, 293 So. 2d 314 (1974). "Just as the mere presence of a person at the time and place of a crime is not sufficient to justify a conviction for the commission of that crime, so the mere presence of the accused in a place where the controlled substance is found is not in and of itself evidence of possession." German v. State, 429 So. 2d 1138, 1140 (Ala. Cr. App. 1982).

Menefee v. State, 592 So. 2d 642, 644 (Ala. Cr. App. 1991).

...

> When constructive possession is relied on, the prosecution must also prove beyond a reasonable doubt that the accused had knowledge of the presence of the controlled substances. *Campbell v. State*, [439 So. 2d 718 (Ala. Crim. App.), *rev'd on other grounds*, 439 So. 2d 723 (Ala. 1983)]; *Yarbrough V. State*, 405 So. 2d 721 (Ala. Crim. App.), *cert. denied*, 405 So. 2d [725] (Ala. 1981). This knowledge may be inferred from the accused's exclusive possession, ownership, and control of the premises. *Temple v. State*, 366 So. 2d 740 (Ala. Cr. App. 1978.) When the accused is not in exclusive possession of the premises, however, this knowledge may not be inferred

> unless there are other circumstances tending to buttress this inference. *Korreckt v. State*, 507 So. 2d 558 (Ala. Cr. App. 1986); *Temple v. State*, [366 So. 2d at 743]. While non-exclusive possession may raise a suspicion that all the occupants had knowledge of the contraband found, a mere suspicion is not enough. Some evidence that connects a defendant with the contraband is required. *Grubbs v. State*, 462 So. 2d 995 (Ma. Crim. App. 1984); *Temple v. State*.

Robinette v. State, 531 So. 2d 682, 686 (Ala. Crim. App. 1987), *rev'd on other grounds*, 531 So. 2d 697 (Ala. 1988).

...

In *Temple v. State*, 366 So. 2d 740 (Ala. Cr. App. 1978), this court provided a nonexclusive list of circumstances that may establish a connection between a defendant and the contraband found on the defendant's property when the defendant is not in the exclusive possession of the premises.

> While the kinds of circumstances which may provide a connection between a defendant and the contraband are unlimited and will naturally depend on the facts of each particular case, 56 A.L.R.3d 948 (1974), it has generally been stated that:
>
> > The kinds and circumstances which provide such connection are: (1) evidence that excludes all other possible possessors; (2) evidence of actual

possession; (3) evidence that the defendant had substantial control over the particular place where the contraband was found; (4) admissions of the defendant that provide the necessary connection, which includes both verbal admissions and conduct that evidences a consciousness of guilt when the defendant is confronted with the possibility that an illicit drug will be found; (5) evidence that debris of the contraband was found on the defendant's person or with his personal effects; (6) evidence which shows that the defendant, at the time of the arrest, had either used the contraband very shortly before, or was under its influence.

The kinds of evidence which might be relevant, but which by themselves do not add the necessary connection are: (1) admissions of previous use; (2) conduct that might be construed as evidencing a consciousness of guilt which was not displayed upon the defendant's confrontation of the possibility that an illicit drug would be discovered; (3) evidence of previous use; (4) evidence that showed the defendant's physical proximity to the contraband.

9 Land and Water L. Rev. 236, 248-49 (1974).

366 So. 2d at 743.

Posey v. State, 736 So. 2d 656, 658-59 (Ala. Crim. App. 1997), *writ quashed*, 736 So. 2d 661 (Ala. 1999).

In addition to the facts previously stated in Part I of this memorandum, Watkins testified that approximately two to three minutes elapsed between the time the appellant entered the apartment and the time he located the appellant under the bed. He later learned that Sedina Bryant leased the apartment, that the appellant was her boyfriend, "that both of them stayed there," and that they both occupied the master bedroom where he found the cocaine. (R. 55.) Watkins further stated, "[B]oth of their clothes were in the master bedroom]. He had clothes in a duffel bag that [Bryant] said was his. And she had clothes on the floor, also. ... [The appellant's clothes] were in a bag in the floor." (R. 55.) Another officer testified that both men's and women's clothing, including pants that looked like they belonged to a man, were on the floor in the master bedroom. Watkins described the location of the cocaine as follows: "As soon as you walked into the room, the TV stand was on this wall to your left. It faced the bed. On top of the TV was like a clear ashtray that had what appeared to be crack-cocaine in it. And on each side of the TV, on the stand itself, there was some more crack-cocaine on the right-hand and left-hand side. Some of it was in small bags, and the other was just laying out." (R. 61-62.) Another officer explained that the television stand had doors that open and slide back so that the television is visible. Forensic testing established that the substance the officers found in the master bedroom was cocaine. Finally, officers found a half-smoked marijuana cigarette in an ashtray on a dresser in the master bedroom. Based on this circumstantial evidence, the

jury could have reasonably concluded that the appellant constructively possessed the cocaine. Accordingly, the appellant's argument is without merit.

III.

The appellant further argues that the trial court erroneously denied his motion for a mistrial after the prosecutor made statements that indicated that he was in jail during the time he was awaiting trial on the current charge. (Issue II in the appellant's brief.) During the State's cross-examination of Sedina Bryant, the following occurred:

> [PROSECUTOR:] [Y]ou had visited him in June, July, August, September, October, November and December -- many times visiting him while he's been in the jail. Correct?
>
> [WITNESS]: Yes, sir.
>
> [PROSECUTOR]: In fact, you visited with him Sunday, December the 10th, just before this trial. Correct?
>
> [DEFENSE COUNSEL]: I'm going to object -- the statement he was in jail.
>
> [PROSECUTOR]: I have a right to ask where she visited him.
>
> THE COURT: Well, ladies and gentlemen, you should not consider the fact that the defendant is in jail. You probably know that some people make bond and some people don't.
>
> [PROSECUTOR]: Only for visitation purposes. That's the only purpose that I offered that she

went to visit him, was to show some type of bias. That's the only reason I'm asking.

[DEFENSE COUNSEL]: Judge, we established bias on the Direct Examination. We established relevance -- the relationship they have.

THE COURT: I'll overrule the objection. I don't think the - - it's that big of a secret to the jury.

[DEFENSE COUNSEL]: We would move for a mistrial.

THE COURT: I will deny the motion.

(R. 98-99.)

> "A motion for mistrial should not be granted where the prejudicial qualities of the comment can be eradicated by action of the trial court." *Nix v. State*, 370 So. 2d 1115, 1117 (Ala. Cr. App.), cert. denied, 370 So. 2d 1119 (Ala. 1979) (quoted in *Henry v. State*, 468 So. 2d 896, 901 (Ala. Cr. App. 1984), cert. denied, 468 So. 2d 902 (Ala. 1985))....
>
> Moreover, a mistrial "specifies such fundamental error in a trial as to vitiate the result." *Diamond v. State*, 363 So. 2d 109, 112 (Ala. Crim. App. 1978), and should be granted only when a "high degree of 'manifest necessity'" is demonstrated. *Wadsworth v. State*, 439 So. 2d 790, 792 (Ala. Crim. App. 1983), *cert. denied*, 466 U.S. 930, 104 S. Ct. 1716, 80 L. Ed. 2d 188 (1984). It is well-settled that "the granting of a

> mistrial is within the sound discretion of the trial [judge], for he, being, present, is in a much better position to determine what effect, if any, some occurrence may have upon the jury's ability to decide the defendant's fate fairly and justly." *Shadle v. State*, 280 Ala. 379, 384, 194 So. 2d 538, 542 (1967). Absent clear abuse, this court will not disturb the trial court's exercise of that discretion. *Wadsworth v. State*, 439 So. 2d at 792....
>
> *Garnett v. State*, 555 So. 2d 1153, 1154-55 (Ala. Crim. App. 1989) (the victim's reference to a prior act of violence by the defendant, which had apparently resulted in her arrest did not require a mistrial where the trial judge instructed the jurors to disregard the testimony).

Eaton v. State, 759 So. 2d 562, 565 (Ala. Crim. App. 1999).

> When, as here, a trial court immediately charges the jury to disregard improper remarks, there is a prima facie presumption against error. *Elmore v. State*, 414 So. 2d 175 (Ala. Crim. App. 1982); *Kelley v. State*, 405 So. 2d 72.8 (Ala. Crim. App.), cert. denied, 405 So. 2d 731 (Ala. 1981); *Chambers v. State*, 383 So. 2d 632 (Ala. Crim. App.), cert. denied, 382 So. 2d 636 (Ala. 1980); *Nix v. State* 370 So. 2d 1115 (Ala. Crim. App.), cert. denied, 370 So. 2d 1119 (Ala. 1979).

> Where a trial court acts promptly to impress upon the jury that improper questions are to be disregarded by them in their deliberations, the prejudicial effects of such remarks are removed. *Minor v. State*, 402 So. 2d 1121 (Ala. Crim. App. 1981); Grey v. State, 369 So. 2d 889 (Ala. Crim. App. 1979); *Brown v. State*, 366 So. 2d 334 (Ala. Crim. App. 1978); *Woods v. State*, 344 So. 2d 1225 (Ala. Crim. App.), *cert. denied*, 344 So. 2d 1230 (Ala. 1976). Even "inadvertent slips" which are prejudicial to a defendant need not be cause for a mistrial where the judge acts promptly to impress upon the jury that improper statements are not to be considered by them. *Richardson v. State*, 374 So. 2d 433 (Ala. Crim. App. 1979); *Elmore, supra*.
>
> The actions of the trial judge were prompt in this case. The matter was not so prejudicial that it could not be erased from the minds of the jury. In such a case, the right to declare a mistrial rests in the sound discretion of the presiding judge.

Woods v. State, 460 So. 2d 291, 295 (Ala. Crim. App. 1984).

In this case, the prosecutor did not in any way indicate that the appellant was in jail on any charge other than the one for which he was being tried. Therefore, the questions did not create a situation in which a mistrial was a manifest necessity. *See Stanton V. State*, 648 So. 2d 638 (Ala. Crim. App. 1994). Also, the trial court immediately instructed the jury not to consider that the appellant was in jail. In addition, it specifically instructed the jury that some people are

able to get out of jail on bond after they are arrested and some are not. The trial court's prompt instructions to the jury were sufficient to eradicate any prejudice to the appellant. *See Harrell V. State*, 608 So. 2d 434 (Ala. Crim. App. 1992); *Woods*, supra. Consequently, the trial court properly denied the appellant's motion for a mistrial.

IV.

Finally, the appellant argues that the trial court improperly denied his *Batson* [*v. Kentucky*, 476 U.S. 79,106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)] motion. (Issue IV in the appellant's brief.) After the jury had been struck, but before it was sworn, the following occurred:

> THE COURT: We can do our Batson motion. Okay, [defense counsel].
>
> [DEFENSE COUNSEL]: Your Honor, the defense would challenge the strikes under the Batson of two jurors ... 107... and ... 179. I admit, Judge, they both testified that they knew one of the defense witnesses, Ms. Bryant. But they both testified that that would not influence their impartiality. I also know, Judge, that the State did also strike another -- a third African-American, ... 101. I would, for the record --I can understand why she would be struck, as she admitted that she had pled guily to a felony charge, I believe, in 1995.
>
> THE COURT: What was the sequence of the State's strikes, in regard to numbers 107 and 179?

[DEFENSE COUNSEL]: I believe, Judge, they -- I would assume they were struck, because they both testified that they knew either Ms. Bryant would be a State's witness or Ms. Bryant's family. But they also testified, Judge, that the fact that they either knew her or her family would not affect their impartiality as jurors.

THE COURT: Which strike was number 107?

[PROSECUTOR]: It was our third strike. Our third strike was number 107. Our fourth strike was number 179. Judge, the facts that he's giving you aren't correct. [Defense counsel] has just alleged to the Court what 179 said – Larry Griggs said that he knew the defendant's -- co-defendant's father and said that – Ms. Bates asked him, Do you know him -- What kind of person is he in the community?

Well, he is a good guy.

Would you tend to believe his daughter, who is the co-defendant, who the defense plans to call that they've subpoenaed?

And the Court is aware of that, and he said he would tend to believe her, that she was a good person.

So, based on that, that's clearly enough to strike. Second, 107 that we struck was the male. Once again, he says that -- the female. Excuse me.

[ASSISTANT PROSECUTOR]: Said she had known the co-defendant since she was a baby. Had known her all her life.

> [PROSECUTOR]: And, you know, once again, that's a race-neutral reason. Just because she says she can be fair, we've shown that she knew them. She didn't come up – she didn't come up on time. She came up after we had already started striking. All the other witnesses – I mean, jurors came up immediately. But because she knows the co-defendant, that's clearly a nonracial reason -- the family member the defense plans to call. We struck [number 101]. And [defense counsel] said there was reasons for us to strike her, and so, I do not feel we have to answer on her. But if you do, we will.
>
> THE COURT: I think those are race-neutral reasons. They are not strikes for cause, but I think they are peremptory strike reasons. So, I will deny the Batson motion."

(R. 30-33.)

The appellant contends that the State did not articulate a race-neutral reason for striking prospective jurors 107 and 179. However, both prospective jurors indicated that they knew Sedina Bryant, who was the appellant's girlfriend and a witness for the defense. "[W]e have held that strikes based on the fact that the veniremember knew or was acquainted with witnesses subpoenaed by the defense are race-neutral. *Bass v. State*, 585 So. 2d 225, 237 (Ala. Crim. App. 1991); *Davis v. State*, 555 So. 2d 309, 314 (Ala. Crim. App. 1989)." *Wilsher v. State*, 611 So. 2d 1175, 1182 (Ala. Crim. App. 1992). Therefore, the State's reason for striking prospective jurors 107 and 179 was race-neutral.

The appellant further contends that the State's reason for striking prospective jurors 107 and 179 was not sufficient because both prospective jurors stated that the fact that they knew Bryant would not affect their ability to be fair.

> [A] veniremember whose "acquaintance with [a] party or relative [or witness] is such that it would result in a probable prejudice" is subject to challenge for cause. *Vaughn v. Griffith*, 565 So. 2d 75, 77 (Ala. 1990), cert. denied, 498 U.S. 1097, 111 S. Ct. 987 [112 L. Ed. 2d 1072] (1991). However, a prosecutor's explanation for his exercise of a peremptory strike "need not rise to the level of a challenge for cause." *Ex parte Branch*, 526 So. 2d 609, 623 (Ala. 1987). It was thus unnecessary in this case for the prosecution to establish that the veniremembers' acquaintance with the appellant or [his] witnesses was "such that it would result in probable prejudice."
>
> [*Wilsher v. State*,] 611 So. 2d [1175,] 1182 [(Ala. Cr. App. 1992)].

Jones v. State, 623 So. 2d 389, 392 (Ala. Crim. App. 1993). Because a prosecutor's reasons for striking prospective jurors are not required to rise to the level of a challenge for cause, the appellant's argument is without merit.

For the above-stated reasons, we affirm the trial court's judgment.

AFFIRMED.

McMillan, P.J., and Cobb, Shaw, and Wise, JJ., concur.

SUPREME COURT of ALABAMA

May 31, 2002

1001739

Ex parte Kenneth Edward Moffitt. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Kenneth Edward Moffitt v. State of Alabama) (Houston Circuit Court: CC-00-904; Criminal Appeals: CR-00-0574).

ORDER

The application for rehearing filed in this cause is overruled.

Overruled – No Opinion

WOODALL, J. – Moore, C.J., and Houston, See, Lyons, Johnstone, and Harwood, JJ., concur; Brown and Stuart, JJ., dissent.

ORIGINAL

(2)

No. 02-327

Supreme Court, U.S.
FILED
NOV 22 2002
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF ALABAMA,
PETITIONER,

VS.

KENNETH EDWARD MOFFITT
RESPONDENT,

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

RESPONDENT'S BRIEF IN RESPONSE TO THE STATES PETITION FOR WRIT OF CERTIORARI

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13 pp

TABLE OF CONTENTS

	PG(S)
TABLE OF AUTHORITIES	1
STATEMENT OF THE ISSUE	1
STATEMENT OF THE FACTS	2,3
ARGUMENT	4-9
REASON FOR DENYING THE PETITION	9
CONCLUSION	10
CERTIFICATE OF SERVICE	10

TABLE OF AUTHORITIES

	PG(S)
ILLINOIS VS. GATES, 462 US. 213 (1983)	4
SPINELLI VS. UNITED STATES, 393 US. 410 (1969)	4
UNITED STATES VS. EDMISTON, 46 F.3d 786 (8th Cir.1995).....	4
KER VS. CALIFORNIA, 374 U.S. 23 (1963)	5
DRAPER VS. UNITED STATES, 358 US 307 (1959)	5
UNITED STATES VS. BELL, 832 F.2d 272 (11th Cir. 1987).....	5
UNITED STATES VS. CORTEZ, 449 U.S. 411 (1981)	5
SIBRON VS. NEW YORK, 392 U.S. 410 (1969)	6
WELSH VS. WISCONSIN, 466 U.S. 740,753,104 S.Ct 2091,2099, 80 L.Ed.2d 732(1984)/...	7,8

OTHER AUTHORITY:

ALABAMA CODE OF 1975, Title 13A-6-24	7
ALABAMA CODE OF 1975, Title 13A-6-4-2	8

STATEMENT OF THE ISSUE

Did the Alabama Supreme Court err in ruling that a police officer did not have probable cause to pursue a fleeing suspect into an apartment because the officer lacked direct evidence - in the form of a statement by a by stander-that the suspect had commited a crime?

STATEMENT OF THE FACTS

On December 12,2000 at a motion to suppress hearing, the following testimony was heard:

The State offered the testimony of Officer Jerry Lynn Watkins. Officer Watkins stated that he was dispatched to Johnson Homes at 3:23 a.m. On a call that shots had been fired in the housing complex. (R.37). They didn't give a specific address to go to they said Johnson Homes 400 Johnson Circle that shots had been. When he arrived, he allegally saw four people standing outside behind the apartments. It appeared that they were arguing. I could hear them yelling at me to stop. And Mr. Moffitt was the one that took off running. I believe it was the female that said that or,no I'm sorry it was the other male that said he had a gun. So I went after him around the building and he ran into the apartment. I had an auxiliary officer with me. I sent the auxiliary around the front because he ran in the back door where the kitchen is. The auxiliary said he tried to go out the front, but saw him and shut the door back so I waited for another officer to get there with me, and we went inside. Officer Watkins stated that he thought Moffitt would probably be pretty dangerous "IF" he was out there shooting (R.39) Watkins stated he had to search the apartment looking for him and his gun. And he searched the kitchen, living room and then the master bedroom that was on the left. (R.39) Officer Watkins stated "yes Ma'am' to the prosecution

after being asked would you say that, at the time you went into that apartment, you were in hot pursuit of the defendant" (P.40) Officer Watkins also stated that "everyone" else" was outside standing around the back door. "everyone else" being Sedina, I believe was her name and her brother Ed. On cross examination when ask who said Kenneth had a gun Officer Watkins stated Ed, "I believe his exact words was there he goes. He's not <u>the</u> gun". (R.41) When he was later ask did he later question Edward Bryant as to why he said Mr. Moffitt had the gun? He said Kenneth told him he had it, but said he never saw it. (P.42) The Officer then went on to discuss issues not dealing with [probable] cause or exigent circumstances.

ARGUMENT

The Alabama Supreme Court's decision of February 22,2002 does not conflict with prior case law.

It is clear that the Alabama Supreme Court's decision is in concert with prior rulings. That Court examined the circumstances and correctly determined that Officer Watkins did not have probable cause to enter the home in question. The Officer had no probable cause to enter the resident because he had no probable cause to suspect that Mr. Moffitt had committed any crime . The Alabama Supreme Courts holding does not change the relevant, test it merely points out the total lack of any evidence of show that Mr. Moffitt may have committed any crime.

The State suggest that the Alabama Supreme Courts opinion conflicts with prior case law: However, the cases cited by the state are distinguishable, and that court's opinion does not conflict with them. The state began its' argument with a citation to Illinios Vs. Gates, 462 U.S. 213 (1983), for the proposition that probable cause for a warrantless search is to be determined by the "Totality of the circumstances" (State brief p.6); However, the Gates opinion involves a search based on a search warrant, not a warrantless search, the Totality test set forth by the United States Supreme Court is for granting or denying search warrants based in part on confidential informants tip. It has absolutely no factual relation to a warrantless search of a home as was the situation in the case at hand,The State's citation and reliance upon this case is misleading and irrelevant. Also quoting Spinelli Vs. United States,393 U.S. 410 (1969) and United States Vs. Edmiston, 46 F.3d 786 (8th Cir. 1995):

Furthermore, in all these cases set out by the State the officer has "personal specific knowledge" to corroborate the informants tip that showed the participation in criminal activity and to provide the necessary trustworthness of the tip. In the case at hand it is important to note that Mr. Moffitt allegedly ran in the back door and the officers had the front and back doors covered (R.38) and that officer Watkins entered the same door minutes later after another officer arrived (R.44) and everyone else was standing around the back door yet he ask no question prior to entering the resident (R.41) although he had time(R.44.),Secondly, the state argues that Alabama Supreme Court's opinion conflicts with Ker Vs. California, 374 U.S. 23 (1963). Also citing Draper Vs.United States, 358 U.S. 307 (1959) and United States Vs. Bell, 933 F.2d 272 (11th. Cir. 1987). These cases too are inapplicable to the case at hand. They deal with the standard for probable cause to make a warrantless arrest they have nothing to do with a warrantless search of a resident; However these cases too are distinguishable and that Courts opinion does not conflict with them, because along with a informant tip the officer had specific personal knowledge of criminal activity which coupled to the tips gave rise of probable cause to arrest. The States quotes from United States Vs. Cortez, 449 U.S. 411,417 (1981), to support its' argument, this case deals with reasonable suspicion to make an inventory search of an automobile the quotation used by the State has nothing to do with the case at hand. This quotation refers to the fact that the officer's was conducting an inventory search based on an abundance of specific articulable

facts from a collection of officers which gave rise to that search. No other officer than Officer Watkins had facts to aid officer Watkins. Finally the state quotes Sibron Vs. New York, 392 U.S. 40 (1968) for the proposition that flight "couple with specific knowledge on the part of the officer relating the suspect to the evidence of crime". This quotation too is misleading. In Sibron, the Officer heard noises at his own door as if someone was attempting entry.

> "When he investigated these noises he saw two men, whom he had never seen before in his 12 years in the building, tip toeing furtively about the hallway. They were still engaged in these maneuvers after he called the police and dressed hurriedly. And When Officer Lasky entered the hallway, the men fled down the stairs."

It was that level of information and activity observed by the officer, coupled with the fact that the suspects fled that led to probable cause in that case. Not just mere flight as is suggested by the state. However, there was no specific knowledge on the part of Officer Watkins to couple with the alleged flight to give rise to probable cause. In fact Mr. Moffitt did not run when "hailed" by an officer. There was evidence whatso ever that Mr. Moffitt was to stop or was specifically approached by the officer; Although the state has made a conscious effort to deceive this Honorable Court by going outside of the Motion To Suppression Hearing over into the trial to get the most damaging statement made after several dress rehearsals and then placing it before this Court" Here he is, here he is, here he is at that moment, Moffitt the defendant ran from the group. One of the other by standers

yelled to Watkins that's him he's got a gun (R.57). This was asserted after these assertions in the motion to suppression hearing. It was the other male that said he had a gun (R.39), yes, I believe his exact words was "there he goes, he's got the gun"(R.41) yeah, the other male that was standing in the group yelled thats him he's got a gun (R.52). He told me that there he goes. He's got a gun, and he took off running (R.53) I pulled up, they started yelling here he is, here he is, here he is and then he took off running they said he's got a gun (R.57) Its contrived situation like this that the "Welsh Vs. Wisconsin" decision was place into law to stop, the unlawful intrusion. The Alabama Supreme Court's Opinion does not narrow anything as is suggested by the State. That Court looked at all of the facts as to what officer watkins knew at the time he entered the home and concluded that no probable cause existed. Thatcourts opinion likewise did not change the standard to require the state to demonstrate a "prima facia showing of a crime". In fact that court properly stated that the test was whether a person of reasonable caution would believe that the action taken by the officer was appropriate. The Alabama Supreme Court correctly concluded that the officer did not have enought facts available to him to "support a reasonable belief that Mr. Moffitt had committed any crime." It is important to note that Mr. Moffitt was not arrested for Reckless Endangerment or Attempted Murder or any crime pertaining to a gun so therefore, the officers action is in direct conflict with his alleged belief (R.45). In Alabama the facts stated from official channels only constitutes a misdemeanor 13A-6-24 Code of Alabama 1975. Discharging a weapon is reckless endangerment

since there was no evidence presented at the scene and none through official channels then the crime of attempted murder becomes an irrational inference 13A-4-2 Code of Alabama, 1975 states an "attempt" to commit a crime consist of (3) elements (1) An intent to commit a crime: (2) performance of some overt act toward commission of the offense; and (3) the failure to consumate it's commission: Thus the courts frequently have talked of attempt as requiring more than preparation or requiring a "direct ineffectual act towards its (the crime) commission.

The Alabama Supreme Court decision correctly concluded the knowledge of "any crime" being a felony was not present in this case. The United States Supreme Court has held that "The Fourth Amendment prohibits the warrantless entry of a home, even with probable cause to arrest for a "minor" offense Welsh Vs. Wisconsin, 466, U.S. 740,753,104 S.Ct 2001 2009, 80 L.Ed.2d 732 (1984): Further the officer could not arrest the defendant for reckless endangerment anyway because they were not present when it occured. The fact that he allegedly fled is irrelevant because the police had no probable cause to believe a felony had been committed. The Alabama Supreme Court did not isolate one factor nor did they inject a "direct evidence statndard" as is suggested by the State but rather viewed the totality of the facts that officer watkins had before him and correctly concluded that he had no probable cause to enter the apartment this was not a narrow focus, but a review of all the evidence, or lack thereof. In fact the Honorable Supreme Court of Alabama followed this Honorable Court's directive so very close that they should be commended, and the State should be reprimanded for attempting to decieve this Honorable Court with trickery and dishonesty by

this petition for writ of certiorari being denied.

REASON FOR DENYING THE PETITION

The State in its selfish motives has overlooked an essential factor in dealing with this case and thats if a person has not been implicated in "any" "crime" then that person cannot be said to be a "suspect". Furthermore, if a person has not been hailed by an officer or approached by an officer then the fact that a person is saw running does not mean that he is running from that officer to justify pursuit, In fact considering the whole picture at the time of the incident without any identification of the reported shooter then Mr. Moffitt could have been the victim as well as the suspect. The officer stated that after everything had calmed down that he ask Edward Bryant did he ever see a gun and his reply was no I never saw it but Kenneth told me he had it (R.42D; However, Sedena another person at the scene stated it was Edward (her brother) who had the gun (R.80,105) This case comes down to the officer being over zealous and improperly trained and is not a chance to a direct evidence standard as is suggested by the State, because the alleged evidence would point only to a "Minor" offense thereby not raising to the level necessary to get around the Fourth Amendment Ban and this Honorable Court should deny Certiorari review.

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CONCLUSION

The ruling of the Alabama Supreme Court is so clearly in concert with prior case law that this Honorable Court should see fit to deny the Writ of Certiorari.

Kenneth E. Moffitt
Kenneth Moffitt Pro-se

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Response Brief upon the State of Alabama, Bill Pryor, by placing the same in the internal mail system postage prepaid and properly addressed this 22 day of November, 2002.

Respectfully Submitted,
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